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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

SEAN D. HOUSEN, SR., Plaintiff and Respondent, v. ULTIMATE AUTOLINE, et al., Defendants and Appellants.	G055878 (Super. Ct. No. 30-2013-00676322) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, James Di Cesare, Judge. Affirmed.

Law Office of Cary S. Macy and Cary S. Macy for Defendants and Appellants.

Law Office of Lawrence J. Hutchens, Lawrence J. Hutchens and Kalman A. Hutchens for Plaintiff and Respondent.

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Ultimate Autoline, Magid Ghassimeh,[1] and Green Car (collectively, appellants) appeal from the trial court's entry of judgment confirming an arbitration award in favor of Sean D. Housen, Sr., and denying appellants' petition to vacate or correct the arbitration award. Appellants contend the court was required to vacate or correct the award based on evident errors by the arbitrator in awarding Housen unwarranted damages for a defective vehicle and allegedly unreasonable attorney fees for the arbitration. Appellants also claim the award was invalid because of delay before the arbitrator issued it, which they assert prejudiced them by leading to the arbitrator's alleged damages error. For the first time on appeal, they also assert the arbitrator committed misconduct by refusing to disclose conflicts of interest.

These contentions are arguably frivolous based on (1) well-established precedent limiting challenges to arbitral awards; and (2) lack of support in the record or law. But we recognize that the scope of the limitations on arbitration challenges, including that *the arbitrator* may not review or revise his or her conclusions of law or fact—even if he or she on reconsideration finds them erroneous—may be surprising even to experienced practitioners. We will therefore address appellants' contentions without further editorial comment.

We affirm the judgment. We also have considered Housen's request for sanctions against appellants. Housen requests roughly $50,000 in attorney fees for nearly 90 hours of time spent at $550 an hour. We find the request patently excessive in light of counsel's claim the appeal was self-evidently frivolous. We therefore decline to make any award of sanctions.

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[1] The spelling of this name is inconsistent throughout the relevant pleadings. We have therefore used the spelling as per the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Appellants in their briefing recount the factual background in an argumentative manner and without citation to the record, contrary to their appellate duty to present a complete picture of the proceedings, including evidence supporting the ruling they challenge. (*Osgood v. Landon* (2005) 127 Cal.App.4th 425, 435.)

For our purposes, the arbitrator's ruling succinctly summarizes the underlying facts and the proceedings as they unfolded here through the arbitrator's award in favor of Housen. We therefore reproduce the pertinent portions of the award, as follows:

"This is a hybrid fraud and Song Beverly Act action. [¶] The great weight of the evidence supports the plaintiff [Housen]'s position that material facts about the 2003 BMW [he] purchased from Ultimate Autoline, which is the fictitious business name or dba of Magid Ghassimieh, were concealed and that concealment amounts to fraud upon Mr. Housen.

"The testimony of Mr. Housen, Darell Blasco, and Randy Kendrick made it clear to this arbitrator that the 2003 BMW could not and would not pass a smog test, the express exclusion of sensors from the warranty was a red flag, the fault code 2772 was a repeated issue, that the engine leaked oil, and that the engine light issue demonstrated a global problem with the vehicle when sold. That the defendant knew the vehicle did not comply with the vehicle code amounts to the concealment of material facts upon which Mr. Housen relied and entitled to him to an award for damages for that fraud . . . .

"On top of that, the defendant was not a credible witness and had several versions of what occurred, but the truth is that he knowingly sold Mr. Housen a defective vehicle. [¶] The defendant, if nothing more, knew that the pre-sale smog check was bogus, which was more than clear from the testimony of expert Blasco.

"Defendant Green Car is a holder of the conditional sales contract for the subject vehicle under the Song Beverly Act, so Green Car stands in the shoes of the dealer and is jointly and severally liable concerning the Song Beverly Act cause of action, though a civil penalty may not be awarded against defendant Green Car as further detailed below.

“It goes without saying that the finding of fraud, and the facts upon which that finding is made, demonstrate that the defendant violated the Song Beverly Act when he knowingly sold a defective vehicle to Mr. Housen, failed to repair the vehicle after sufficient attempts, and refused to buy back the vehicle. [¶] On top of that, Mr. Housen had to purchase a replacement vehicle as an incidental damage for the defendant’s deception. [¶] In addition, the arbitrator finds that the conduct of the defendants Ultimate Autoline and Magid Ghassimieh was willful under the Song Beverly Act and [preliminarily] assesses a civil penalty in the amount of $5,000.00.”

Ultimately, however, the arbitrator awarded Housen $5,000 in punitive damages in lieu of the civil penalty, explaining that, “under the law,” Housen was not entitled to both the civil penalty and punitive damages. The punitive damages award did not apply against Green Car as the subsequent holder of the seller’s rights under the vehicle sales contract. Housen apparently financed his purchase of the defective BMW through Green Car.

The arbitrator further awarded to Housen against all three appellants, including Green Car: (1) $6,000 for his down payment in that amount for the defective BMW, (2) $1,423 for the payments he had made to date on the car, and (3) $8,478 for the replacement vehicle he had to purchase. The arbitrator also awarded Housen $6,706 as the “[r]emaining amount [he] owed” for the BMW “under the sales contract”; in other words, reimbursement for payments he never made.

As we discuss below, there was a delay of nearly three months between the arbitration hearing in December 2015 and the date in March 2016 when the arbitrator issued the foregoing award. Appellants claim they became aware of the award only after receiving Housen's motion for attorney fees. The arbitrator granted appellants 60 days to file an opposition to the award and to respond to the attorney fees motion.

Appellants filed an opposition to the arbitration award and to Housen's request for attorney fees and costs totaling $55,764.40. In July 2016, the arbitrator granted Housen's motion for attorney fees and costs. The arbitrator did not comment on the merits of Housen's opposition to the substantive award, observing only that he had "reviewed" it. Housen and appellants then filed competing petitions in the trial court: Housen to confirm the arbitration award and appellants to correct or alternatively to vacate it. The trial court denied appellants' petition and granted Housen's petition to confirm. Thereafter, the superior court entered judgment in Housen's favor by confirming the award, including the arbitrator's award of attorney fees and costs. Appellants now appeal.

DISCUSSION

1. *Evident Error*

Appellants contend the trial court erred in failing to correct what they regard as an evident error in the arbitrator's award. Specifically, they assert the arbitrator erred by awarding Housen $6,706 as the "Remaining amount owed under the sales contract" for the BMW. Appellants insist the $6,706 figure is improper as a measure of damages because Housen never paid that sum; it was the total amount still due on the BMW pursuant to his payment schedule. Appellants assert they brought the claim to the arbitrator's attention in their opposition to the award. The arbitrator rejected it without explanation.

In seeking relief in the trial court to correct or to vacate the arbitration award, appellants invoked statutory language authorizing the court to correct "an evident miscalculation of figures or an evident mistake in the description of any person, thing or property referred to in the award" (Code Civ. Proc., § 1286.6, subd. (a)) and to fix imperfections in the award that are "a matter of form, not affecting the merits of the controversy." (*Id.*, subd. (c); all further undesignated statutory references are to this code.)

The trial court rejected appellants' argument because the court concluded appellants were not challenging the form of the award; nor did they identify a miscalculation of figures. Instead, the court explained that appellants asserted, in essence, that the arbitrator made a legal error in "the amount awarded," but reviewing courts may not substitute their judgment for the arbitrator's on legal questions. The court observed that "arbitrators don't exceed their powers simply by reaching an [allegedly] erroneous conclusion."

The trial court did not err. "[A]n arbitrator's decision cannot be reviewed for errors of fact or law." (*Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 11 (*Moncharsh*).) Even "an error of law apparent on the face of the award that causes substantial injustice does not provide grounds for judicial review." (*Id.* at p. 33.) Instead, "by voluntarily submitting to arbitration, the parties have agreed to bear that risk in return for a quick, inexpensive, and conclusive resolution to their dispute." (*Id.* at p. 11.) The Supreme Court observed in *Moncharsh*: "As early as 1852, this court recognized that, 'The arbitrators are not bound to award on principles of dry law, but may decide on principles of equity and good conscience, and make their award *ex aequo et bono* [according to what is just and good].' 'As a consequence, . . . "[p]arties who stipulate in an agreement that controversies that may arise out of it shall be settled by arbitration, may expect not only to reap the advantages that flow from the use of that nontechnical, summary procedure, but also to find themselves bound by an award reached by paths neither marked nor traceable and not subject to judicial review."'" (*Id.* at p. 11, citations omitted.)

As our Supreme Court also has explained, "[T]o take themselves out of the general rule that the merits of [an arbitration] award are not subject to judicial review, the parties [to an arbitration agreement] must clearly agree that legal errors are an excess of arbitral authority that is reviewable by the courts." (*Cable Connection, Inc. v. DIRECTV, Inc.* (2008) 44 Cal.4th 1334, 1361.) Assuming arguendo that the arbitrator erred, appellants point to nothing in the arbitration agreement to suggest the parties stipulated to judicial authority to correct a damages error. Their attempt to cast their damages claim as a request to correct miscalculated figures or the form of the award therefore fails.

The same is true for appellants' opposition to the request for attorney fees, addressed first to the arbitrator and then raised again in the trial court and now on appeal. Appellants claim this request is "*per se* unreasonable" under California law. Implicit in this contention is appellants' concession that the arbitrator had the authority to award attorney fees, but awarded an unreasonable sum. As the trial court observed in declining to vacate the award, "even if the award was incorrect, it was not in excess of the arbitrator's powers. And it was not 'imperfect' as to form," nor did it involve a miscalculation of figures. Appellants' bid for reversal on appeal therefore must fail. As discussed, well-established precedent precludes judicial review of the merits of an arbitration decision. (*Moncharsh, supra,* 3 Cal.4th at p. 11.)

2. *Delay*

Appellants challenge the arbitration award based on the delay of several months before the arbitrator issued the award. This claim fails under the clear terms of the parties' stipulation to arbitrate their dispute and under well-established case law. Appellants complain in their opening brief, as they did to the trial court in attempting to vacate or correct the award, that the arbitrator did not issue the award until 88 days after the arbitration hearing. They also assert they did not receive the award for another 36 days "after it was allegedly served," resulting in more than 119 days elapsing between the hearing and notice of the award. They assert, "A prompt award is necessary. 119 days is too long. Facts are forgotten and mistakes can be made." Indeed, they attribute the arbitrator's alleged $6,706 damages error to the delay. They suggest that the delay caused the arbitrator to "forg[e]t what the case was truly about" and "merely cut and paste[] his award [from the damages requested in the] plaintiff's closing brief."

Appellants contend the American Arbitration Association's (AAA) arbitral rules applied and that the delay here in issuing the award was "too far outside" that organization's "30 day award window to be valid." They note a uniform policy among arbitration bodies including Judicial Arbitration and Mediation Services (JAMS), Judicate West, and others that adhere to a 30-day period in which to issue an award following an arbitration hearing.

There is no sound basis in the facts or law for appellants' claim of error here. They cite page 100 of the clerk's transcript for their claim that AAA's rules applied under the arbitration clause in the underlying sales contract for Housen's BMW purchase. But as Housen points out, appellants failed to include the arbitration agreement in the clerk's transcript. Page 100 does not include the arbitration clause, which we located on the back side of the BMW sales contract in augmented materials.[2]

The arbitration clause merely provides that the parties "*may* choose the American Arbitration Association . . . *or any other organization to conduct the arbitration* . . . ." (Italics added.) The parties did not choose AAA or designate that its rules applied to their arbitration. Instead, at the outset of litigation, after Housen filed his amended complaint, the parties entered a stipulation in which they agreed to appoint a private arbitrator. The trial court accepted the stipulation and ordered the matter to arbitration. The parties did not mention the AAA rules in their stipulation.

Appellants' claim of error based on AAA's 30-day rule is unsound—not only because the parties did not select those rules—but because they agreed in their

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[2] We grant appellants' August 27, 2018 motion to augment the record, which includes the sales contract.

stipulation that "the provisions of Code of Civil Procedure §1280, et seq. shall apply." Section 1283.8 does not contain a 30-day rule. Instead, it provides in full: "The award shall be made within the time fixed therefor by the [parties' arbitration] agreement or, if not so fixed, within such time as the court orders on petition of a party to the arbitration. The parties to the arbitration may extend the time either before or after the expiration thereof. A party to the arbitration waives the objection that an award was not made within the time required unless he gives the arbitrators written notice of his objection prior to the service of a signed copy of the award on him." (§ 1283.8.)

Here, the parties' agreement specified no period in which the arbitrator was required to make his decision, nor did appellants petition the trial court to set a deadline. Appellants' challenge based on the arbitrator exceeding a purported 30-day window is therefore without factual or legal support.

3. *Alleged Prejudice from Delay*

Appellants claim they suffered prejudice as a result of the lengthy delay between the hearing and the issuance of the award, regardless of what the applicable time frame was for the arbitrator to issue the award. As with the claim of delay itself, this assertion is unsound both factually and legally. Appellants, through their counsel, took a markedly different position regarding this delay below than they now assert on appeal, and they omit mention of the relief they received.

Specifically, when the arbitrator explained that the delay in issuing the award was the result of his travelling to Utah to care for his younger brother who was ill, appellants' counsel expressed great sympathy. The arbitrator also noted "the address on [his] proof of service [for mailing the award] appears to be correct." It therefore remains a mystery why, as appellants claim, they did not receive notice of the award for more than 30 days after the arbitrator mailed it. But appellants fail to disclose in their briefing that the arbitrator, at appellants' request, granted them 60 days "to respond to the award and [to Housen's] motion for fees." Their claim of prejudice from the delay is therefore without merit because they had a full opportunity to respond to the arbitrator's award, including by asserting their claim the arbitrator should not have awarded Housen $6,706 in damages and by contesting the attorney fees Housen requested as the prevailing party.

Appellants' challenge based on alleged delay is also legally unsound because just as this court and the trial court cannot countermand an arbitrator's decision on the merits, nor could the arbitrator himself revisit his decision. Section 1284 establishes the grounds on which an arbitrator may correct an award after issuing it. (E.g., *Cooper v. Lavely & Singer Professional Corp.* (2014) 230 Cal.App.4th 1, 14 (*Cooper*).) Corrections are limited to "'evident miscalculations of figures or descriptions of persons, things, or property'" and to "'nonsubstantive matters of form.'" (*Ibid.*) "The statutory grounds . . . do not permit the arbitrator to make substantive changes to the award's determinations of fact and law." (*Ibid.*) The power section 1008 invests in trial judges to reconsider and revise their own rulings does not apply to arbitrators. (See *id.* at pp. 15-17.) There is a limited exception under which arbitrators may "amend a purported final award to include rulings on an *omitted* issue." (*Id.* at p. 14.) That was not the situation here.

The Legislature's adoption in section 1284 of strict limits on arbitral revision rests on longstanding precedent. "'It is, apparently, an ancient rule that "when arbitrators have published their award by delivering it to the parties as the award, that it is not the subject of revision or correction by them, and that any alteration without the consent of the parties will vitiate it."'" (*Cooper*, *supra*, 230 Cal.App.4th at p. 13.) It was appellants' responsibility to prevent any delay related to the issuance of the award by petitioning the trial court to set an award deadline. (§ 1283.8.) The anti-revision rule is a matter of public policy, and "[t]he Legislature declares state public policy, not the courts." (*In re Marriage of Tavares* (2007) 151 Cal.App.4th 620, 628.)

4. *Arbitrator's alleged conflict of interest*

Finally, appellants assert reversal of the trial court's decision not to vacate the arbitration award is necessary because the arbitrator failed to disclose conflicts of interest. Again, this claim is not supported by the record. It is also not reviewable on appeal because appellants did not raise it below in the trial court.

Factually, appellants' assertion that the arbitrator "refused to disclose his conflicts of interest" is unfounded. In an undated e-mail to the parties, the arbitrator stated, "I am hereby disclosing that I have probably conducted mediations for each of your firms in the past; [and] some of the parties might have been the same as well. See the attached . . . ." The arbitrator noted that the disclosure requirements for arbitrators under the California Rules of Court "are now more detailed . . . than for a sitting judge," including the "exact dollar amounts awarded," and that, having mediated over 5,000 cases since 1986, "of which about 1,000 or more were Song Beverly cases," he "could never create a full disclosure." He therefore invited the parties to provide information about cases they may have had before him, and Housen's attorney disclosed prior arbitrations, as appellants acknowledge.

We infer this disclosure occurred before the arbitrator conducted the hearing although the date is uncertain. In any event, the trial court in ordering the matter to arbitration highlighted the parties' ability to disqualify their chosen arbitrator, stating that "if Mark Ashworth, is unable or disqualified to serve as the arbitrator, this matter will go back to the civil active list for trial." Appellants never sought to disqualify Ashworth, and therefore waived the issue under section 1281.91, subdivision (b)(1). That statute provides that "the proposed neutral arbitrator shall be disqualified on the basis of the disclosure statement after any party entitled to receive the disclosure serves a notice of disqualification within 15 calendar days after service of the disclosure statement." If—as was the case here—no such notice is served, "[t]he right of a party to disqualify a proposed neutral arbitrator pursuant to this section shall be waived." (*Id.*, subd. (c).)

The issue is similarly forfeited on appeal since appellants did not raise their nondisclosure claim with the trial court as a reason to vacate the arbitration award. It is axiomatic that "[p]oints not raised in the trial court will not be considered on appeal." (*Hepner v. Franchise Tax Bd.* (1997) 52 Cal.App.4th 1475, 1486.)

5. *Sanctions*

Before appellants filed their opening brief on appeal, Housen filed a motion to dismiss the appeal as frivolous. At that time, Housen could not know exactly what issues appellants would raise in their opening brief, but his attorney expended nearly 23 hours in the dismissal motion to argue the well-established and well-known general limitations on challenges to arbitration awards. In relation to that motion, counsel sought roughly $12,485 in sanctions. We denied the motion to dismiss without prejudice to Housen later seeking sanctions.

In their opening brief, appellants raised issues of delay in the arbitration award and prejudice from the delay that Housen had only addressed in a cursory manner in his dismissal motion. As discussed, there is no factual or legal merit in appellants' claims of delay and prejudice from delay where the parties stipulated to arbitration under the CAA, including section 1283.8—which specifies no time limit. Housen did not bring this dispositive provision to our attention, despite 54 additional hours of attorney time billed for his respondent's brief, which in part rehashed the dismissal motion. An attorney's failure to "uncover or cite" dispositive legal authority affects our estimation of the hours counsel "log[s] on appeal." (*Christian Research Institute v. Alnor* (2008) 165 Cal.App.4th 1315, 1328 (*Christian Research*).)

We are sympathetic to any litigant's interest in receiving some explanation for an adverse ruling, and the $6,706 that the arbitrator awarded Housen remains unexplained. Although litigants agreeing to arbitration accept the risk an arbitrator may make unreviewable legal or factual errors, the arbitrator here may have created false hope by inviting appellants' opposition—illustrating that even experienced practitioners may be unaware arbitrators have no authority to revisit their awards once issued. Housen in his extensive briefing did not point out this dispositive aspect of arbitration, which doomed appellants' challenges in the trial court and on appeal given the limitations on judicial review of arbitration awards.

Housen now seeks sanctions for a frivolous appeal in the sum of $47,795 for his attorney fees on appeal, consisting of 22.7 hours billed for the motion to dismiss; 2.2 hours for a motion to augment the record, which we granted; 53.8 hours for a 36-page respondent's brief that claimed the appeal "is not even a close question"; and an additional 8.2 hours to recapitulate in a separate sanctions motion the sanctions requests in the dismissal motion and respondent's brief.

Sanctions on appeal "should be used most sparingly." (*In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 651.) An appeal is frivolous and therefore sanctionable when no reasonable attorney would believe the appeal has merit (*id.* at p. 650), and we can only conclude it has been prosecuted for harassment. (*Dodge, Warren & Peters Ins. Services, Inc. v. Riley* (2003) 105 Cal.App.4th 1414, 1422.) Sanctions may be imposed "on a party or an attorney." (Cal. Rules of Court, rule 8.276(a).) A responding party's attorney fees may factor into determining the amount of sanctions awarded (*Keitel v. Heubel* (2002) 103 Cal.App.4th 324, 342 (*Keitel*)), but an inflated request is grounds for the court to reduce or deny an attorney fee award altogether. (*Christian Research*, *supra*, 165 Cal.App.4th at p. 1329.)

Here, appellants' arguments were frivolous in that they largely disregarded black letter law that arbitration awards are generally unreviewable. This problem was compounded by the fact that appellants raised for the first time on appeal an issue of arbitrator misconduct that had no support in the record. We also admonish appellants' counsel for his self-serving presentation of the facts in his briefs, as well as his consistent failure to cite the record as required. We have therefore considered awarding sanctions.

At oral argument, Housen's counsel indicated he was requesting just over $12,000 in sanctions. But as set forth above, his written request totaled $47,795. The disparity between these requests is striking. As the Supreme Court has observed in a different context: '"If . . . the Court were required to award a reasonable fee when an outrageously unreasonable one has been asked for, claimants would be encouraged to make unreasonable demands, knowing that the only unfavorable consequence of such misconduct would be reduction of their fee to what they should have asked in the first place."' (*Serrano v. Unruh* (1982) 32 Cal.3d. 621, 635.)

We believe this rationale applies to the sanctions request made here. We therefore conclude that, on balance and despite the shortcomings of appellants' counsel, no award of sanctions is warranted.

DISPOSITION

The trial court's entry of judgment confirming the arbitration award is affirmed. Housen is awarded his costs on appeal.

GOETHALS, J.

WE CONCUR:

MOORE, ACTING P. J.

ARONSON, J.